No. 881

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In the

Supreme Court of the United States

OCTOBER TERM, 1957

NOS. —— AND ——

WILLIAM AMLIN and DARRELL AMLIN, d/b/a AMLIN CARTAGE, H. BONDY, d/b/a BONDY CARTAGE, EDMUND GOYEAU, LEO GOYEAU and OSCAR GOYEAU, d/b/a ED. GOYEAU & SONS, CHARLES HINTON & CO., LTD., HUSBAND INTERNATIONAL TRANSPORT, LTD., THE E. W. LANCASTER CO., LTD., McCOURT CARTAGE, WILLIAM HAROLD MORRICE, d/b/a MORRICE CARTAGE COMPANY, OVERLAND EXPRESS, LTD., PARENT CARTAGE, LTD., THE WINDSOR TRUCK AND STORAGE CO., LTD., DIRECT-WINTERS TRANSPORT, LTD., INTER-CITY TRUCK LINES, LTD. and CONSOLIDATED TRUCK LINES, LTD., APPELLANTS,

v.

PETER VERBEEM, doing business as PETERS CARTAGE, APPELLEE

WILLIAM AMLIN and DARRELL AMLIN, d/b/a AMLIN CARTAGE, H. BONDY, d/b/a BONDY CARTAGE, EDMUND GOYEAU, LEO GOYEAU and OSCAR GOYEAU, d/b/a ED. GOYEAU & SONS, CHARLES HINTON & CO., LTD., HUSBAND INTERNATIONAL TRANSPORT, LTD., THE E. W. LANCASTER CO., LTD., McCOURT CARTAGE, WILLIAM HAROLD MORRICE, d/b/a MORRICE CARTAGE COMPANY, OVERLAND EXPRESS, LTD., PARENT CARTAGE, LTD., THE WINDSOR TRUCK AND STORAGE CO., LTD., DIRECT-WINTERS TRANSPORT, LTD., INTER-CITY TRUCK LINES, LTD. and CONSOLIDATED TRUCK LINES, LTD., APPELLANTS,

v.

DONALD GOUIN, doing business as DON'S TRANSPORTS AND CARTAGE, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Michigan, Southern Division, 154 F. Supp. 431, is appended hereto in Appendix A, *infra*, pp. 23-30. The Orders of Permanent Injunction entered pursuant to said decision in the instant causes are attached hereto in Appendix B-1 and B-2, *infra*, pp. 31-34. The report and order of the Commission, Division 1, dated October 18, 1955, entitled MC 114-663, *Peter Verbeem Common Carrier Application*, and the orders of the Commission of March 26, 1956, and August 28, 1956, denying petitions for reconsideration, all unreported, are appended as Appendices C-1, C-2 and C-3, *infra*, pp. 35-39. The report and order of the Commission, Division 1, dated December 23, 1955 entitled MC 114-807, *Donald Gouin Common Carrier Application*, and the orders of the Commission of May 3, 1956, and August 24, 1956, denying petitions for reconsideration, all unreported, are appended as Appendices D-1, D-2 and D-3, *infra*, pp. 40-46.

JURISDICTION

The Orders of Permanent Injunction entered by the District Court in these two causes were entered on September 16, 1957. These Appellants filed Notices of Appeal in each cause on November 14, 1957.

The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U. S. C. 1253 and 2101(b), and is sustained by the following decisions:

Interstate Commerce Commission v. Parker, 326 U. S. 60;

American Trucking Associations, Inc. v. United States, 355 U. S. 141.

STATUTE INVOLVED

The instant cases at bar involved a construction of Section 203 (b)(8), of the Interstate Commerce Act, Public Act No. 255, 74th Congress, 49 Stat. 543 which reads in part, as follows:

> "• • • nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, • • •."

QUESTIONS PRESENTED

1. Did Congress intend that Section 203(b)(8) of the Interstate Commerce Act, which provides a limited exemption to the "transportation of • • • property in interstate and foreign commerce • • • between contiguous municipalities • • •", should apply to transportation between contiguous municipalities where one of such municipalities is located in a foreign country?

2. Did the District Court err in overturning the Interstate Commerce Commission's construction of Section 203 (b)(8) of the Interstate Commerce Act as made in *Com-*

mercial Zones and Terminal Areas, Ex Parte No. MC-37, 46 M. C. C. 665, where such construction was reasonable, consistent and practicable and had been continuously followed for over eleven (11) years?

STATEMENT OF CASE

The two appeals here under consideration find their origins in individual applications filed by Appellees with the Interstate Commerce Commission seeking authority as a common carrier by motor vehicle to transport general commodities, with certain exceptions not here material, between the International Boundary line at or near Detroit, Michigan, on the one hand, and, on the other, Detroit, Michigan.[1] Hearings were held on both applications before a Joint Board,[2] and the 13 Appellant motor carriers taking this appeal appeared at said hearings in opposition thereto. All parties were afforded full opportunity to submit evidence.

Thereafter, the Joint Board recommended a total denial of the Verbeem application for the reason that the preponderance of the evidence established that there was no need for additional motor carrier service, and the Joint Board in the Gouin application recommended a grant of authority limited to roofing and roofing materials and a denial of the rest of the application for the same reason underlying the denial in the Verbeem application.[3]

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[1] Verbeem filed his application on April 1, 1954; Gouin filed his on June 21, 1954.

[2] The Vebeem hearing was held on October 11, 1954; the Gouin hearing was held on January 25, 1955.

[3] In the Verbeem case on December 6, 1954; and in the Gouin case on February 24, 1955.

Verbeem filed Exceptions to the Joint Board recommendation, and, after Reply filed by Appellants, said Exceptions were denied by Division 1 of the Commission (Appendix C-1). Gouin likewise filed Exceptions to the Joint Board's recommended denial in part of his application, and Appellants filed Exceptions to that portion of the application acted upon favorably by the Joint Board. After reviewing all of the evidence, Division 1 of the Commission denied the application in its entirety (Appendix D-1).

Both Appellees, thereafter, filed Petitions seeking reconsideration by the entire Commission of the denials of the application, which Petitions were denied by the Commission on the grounds that the evidence adequately supported the findings of Division 1.[4]

Further Petitions for Reconsideration were filed by the Appellees[5] and denied.[6] Thereafter, on November 9, 1956, the Appellees filed their Complaints in the District Court.

It should be noted that both Appellees contended in their respective hearings that they had been engaging in the transportation of property by motor vehicle between Windsor, Ontario, Canada, on the one hand, and, on the other, Detroit, Michigan, for several years *prior* to the

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[4] Verbeem's Petition was denied on March 26, 1956 (Appendix C-2, *infra*); Gouin's Petition was denied on May 3, 1956 (Appendix D-2, *infra*).

[5] At no time during the lengthy proceedings before the Commission did Verbeem raise any question as to a claimed exemption under Section 203(b)(8) of the Interstate Commerce Act. This question was raised by Gouin for the first time in his second Petition for Reconsideration.

[6] Verbeem's second Petition was denied on August 28, 1956 (Appendix C-3, *infra*); Gouin's second Petition was denied on August 24, 1956 (Appendix D-3, *infra*).

filing of the applications with the Commission.[7] Also, both Appellees are domiciled in Canada.[8]

The two civil complaints were consolidated for hearing by the three-Judge District Court, and in its Opinion, rendered August 2, 1957 (Appendix A, *infra*), the Court held that Appellees' operations between Detroit and Windsor were operations in foreign commerce between contiguous municipalities within the meaning of Section 203(b)(8) of the Act and that the Commission should have dismissed the Appellees' applications for lack of jurisdiction, rather than denying them on the merits of their cases as made in the application proceedings. It should be noted that the Court affirmatively found that "there is no evidence that the Commission acted arbitrarily or capriciously" (Appendix A, *infra*, p. 24). In other words, the Court affirmatively ruled that the two complaints were not well founded insofar as they alleged that the Commission had acted contrary to the great weight of the evidence in denying said applications on their merits.

In ruling that Appellees' operations fell within the partial exemption of Section 203(b)(8) of the Act, the Court declined to accord any weight to the construction of Section 203(b)(8) afforded by the Commission in *Ex Parte No. MC-37, Commercial Zones & Terminal Areas*, 46 M. C. C. 665 (1946), wherein the Commission construed the statutory language "between contiguous municipalities" as not encompassing operations between two contiguous municipalities where one of same is located in a foreign country (See Appendix E for pertinent portion of said Opinion).

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[7] Verbeem claimed to commence his Detroit-Windsor operations in October, 1955; Gouin claimed to have commenced his Detroit-Windsor operations on February 7, 1946.

[8] Verbeem is domiciled in Windsor, Ontario, Canada; Gouin is domiciled at Tecumseh, Ontario, Canada, a suburb of Windsor.

THE QUESTIONS ARE SUBSTANTIAL

The case at bar poses an issue of such great importance as to warrant the plenary consideration of this Court; for, not only does it involve directly those national public considerations which prompted Congress to pass Part II of the Interstate Commerce Act, but, also, it is significantly related to our international trade relations with Canada and Mexico.

In *American Trucking Association v. U. S.*, 344 U. S. 298, at 312, 97 L. Ed. 337, 73 S. Ct. 307, this Court expressed those national interests underlying the Act and the evils sought to be eradicated as follows:

> "Then the industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture. And as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility. So, Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition, while at the same time protecting existing routes through the 'grandfather' clause."

The Appellees here contend, and the District Court so found that Appellees' motor carrier operations are privileged to the partial exemption provided in Section 203 (b)(8) of the Act. If such exemption is gained, though not intended by Congress, it is manifest that the legislative purpose shall have been thwarted and the remedial aspects of the Act frustrated. Thus, where a case presents for determination the basic question of applicability of the Act to motor carrier operations, substantial in quantity, it is respectfully urged that it is deserving of plenary

consideration by this Court. Otherwise, those very evils which Congress sought to remedy may be allowed to persist contrary to the public interest.

Appellees' motor carrier operations are clearly in foreign commerce and are, unless exempted by clear statutory language, subject to the full impact of the Interstate Commerce Act. In *Piedmont & Northern Railway Company v. Interstate Commerce Commission*, 286 U. S. 299, at 311, 76 L. Ed. 1115, this Court stated:

> "The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason *exemptions from its sweep should be narrowed and limited to effect the remedy intended.*"

The District Court found that Section 203 (b)(8) provides a partial exemption for Appellees' operations and those of other carriers similarly situated. It ruled that the language "between contiguous municipalities" was intended by Congress to include a foreign municipality which is contiguous to a municipality in the United States

First, it is important to clarify the extent of the so-called partial exemption. Where Section 203 (b)(8) is applicable, the carrier need only comply with those "provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment". Thus, the carrier so exempted need not establish (1) that he is *fit, willing* and *able* to perform the service proposed and to conform to the provisions of the Act and the rules and regulations of the Commission, (2) that the proposed operation is required by the present or future public convenience and

necessity, or (3) establish just and reasonable rates for the protection of the shipping public.[9]

Having in mind this Court's statement in *American Trucking Association v. U. S., supra,* of the legislative purposes, it is apparent that the exempting operation of Section 203 (b)(8) encompasses the most basic remedial provisions of the Act. Thus, the breadth of the claimed exemption expresses the great importance of this case.

Secondly, the impact of the District Court's ruling is far-reaching from the standpoint of geographical application. The District Court itself noted that "It is common knowledge that the United States borders at Mexico and Canada are dotted with 'twin-cities' one of which is on each side of the border".[10] The effect of the District Court ruling is that motor carrier operations between these multitudinous "twin-cities" are freed from the sweep of the Interstate Commerce Act, except those provisions relating to safety of operations. Thus, the appealed from ruling has significance far beyond the Detroit-Windsor locale, and bears directly upon motor carrier operations between the United States and Canada and the United States and Mexico along the thousands of miles of common boundary shared by these countries.

In evaluating the significance of the issue posed in this case, consideration must be given to the purpose of Congress in creating the exemption for so-called commercial zone operations. Section 203 (b)(8) establishes the exemption for three situations, namely, where the transportation is conducted *wholly* within (1) a municipality, (2) between contiguous municipalities, or (3) within a zone

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[9] Section 207 and Section 216 of Act.

[10] See, Appendix A, *infra*, pp. 23-24.

adjacent to and commercially a part of any such municipality, or municipalities.

The Interstate Commerce Commission in *New York, N. Y., Commercial Zone*, 2 M. C. C. 191, at 192, stated that,

> "The purpose of exemption in Section 203 (b)(8) was to remove from Federal regulation operations which, although in interstate or foreign commerce, were nevertheless of a distinctively *local* or *urban* type, which we termed 'intraterminal' as distinguished from intercity or intercommunity operations."

By way of further amplification the Commission stated at page 192:

> "Those who framed this language clearly had in mind this conception of urban transportation when they used the words 'wholly within a municipality'. They realized, however, that there are many strictly urban communities which, from a governmental standpoint, are made up of two or more municipalities, so they added 'or between contiguous municipalities'. On reflection, it appeared that even these words might not be sufficiently comprehensive, so to cover all contingencies they further added the words 'or within a zone adjacent to and commercially a part of any such municipality or municipalities'. Implicit in the additions, however, is the conception, with which the framers started, of a single and distinctively urban community, 'wholly within' which motor-carrier operations would be of the local cartage or street-bus type."

In making this expression of the legislative intent inhering in Section 203 (b)(8), the Commission relied, in part, upon the explanation provided by Senator Wheeler, Chairman of the Committee on Interstate Commerce, when he stated in reference to Section 203 (b)(8) that "Pro-

vision is also made that regulation shall not apply to what may be termed *'intramunicipal'* or 'occasional' *operations* * * *". (Emphasis added.)[11]

Thus, the underlying factual conception in Section 203 (b)(8) is a commercially integrated area. The Commission has since 1935 undertaken to delineate individually the "commercial zone" with respect to many large municipalities in the United States such as New York, Detroit,[12] Chicago, etc., and in *Ex Parte No. 37, Commercial Zones & Terminal Areas, supra,* prescribed general rules for ascertaining such commercial zones for other cities not individually treated. In *Ex Parte No. 37 supra,* at p. 672, the Commission described this process as follows:

> "Actually, we do not 'create' or 'establish' any commercial zones, nor have we any power to 'extend' any exemption. A commercial zone about each municipality, within which motor transportation of the kind contemplated by section 203 (b)(8), is conducted, already exists by reason of trade practices, the uses to which the area is put, and geographical and political considerations. The existence of such zones is an economic fact."

If commercial integration, an economic fact depending on trade practices, geographical and political considerations, is the keystone to the Congressional purpose in Section 203 (b)(8), then the question is immediately raised in this case whether such integration between contiguous municipalities, each in a different country, could reasonably have been assumed to exist by Congress.

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[11] 79 Congressional Record 5651.

[12] 1st Supplemental Report to Ex Parte No. MC-37, Commercial Zones & Terminal Areas, 48 M. C. C. 95.

Where two cities, both in the United States, are contiguous, it is reasonable to assume in almost all instances that commerce and trade would freely flow uninhibited by municipal boundary lines. Similarly, where the two contiguous cities lie in two different states in the United States, trade and commerce would be largely unaffected by the state boundary line, and a single community, economically and commercially, would be the reasonable fact.

However, the application of this test to two contiguous municipalities, one in the United States and the other in Canada or Mexico, demonstrates the error of the grammatical construction afforded Section 203 (b)(8) by the District Court, who found no difference from a transportation standpoint between Windsor-Detroit motor carrier operations and motor carrier operations between Kansas City, Kansas, and Kansas City, Missouri, or between New York City and Newark, New Jersey.[13]

It must surely be apparent that the existence of the International Boundary line, with its consequent custom barriers, duties, immigration requirements, language differences along United States-Mexico Boundary, etc., effects such a decisive separation of those two cities as to preclude factually any accurate description of them as a "single community", or, in the language of Senator Wheeler, to describe motor carrier operations between such cities as "intramunicipal".

There can be no question with regard to the existence of interacting commercial influence between such cities as Detroit and Windsor, but there is a substantial difference between commercial influence and commercial integration.

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[13] See, Appendix A, *infra*, pp. 23-24.

In *New York, N. Y., Commercial Zone*, 1 M. C. C. 665, at p. 671, the Commission noted this important distinction:

> "As we stated in *St. Louis, Mo.-East St. Louis, Ill., Commercial Zone*, 1 M. C. C. 656, decided concurrently herewith, for the purposes of section 203 (b)(8), *the commercial zone of a municipality and contiguous municipalities cannot be found to include all of the territory coming within the commercial influence of the municipalities.* Commercial zones defined under section 203 (b)(8) may include only those areas which are 'commercially a part' of municipalities and contiguous municipalities and are adjacent thereto. By restricting the commercial zones to areas which are adjacent to municipalities and contiguous municipalities, it is presumed that Congress intended to restrict such zones to those areas in which transportation by motor vehicle is in the nature of an intraterminal movement." (Emphasis added.)

An understanding of the Congressional intent in Section 203 (b)(8) is important at this point in this proceeding for it demonstrates the error committed by the District Court in its overly simplified, grammatical construction of the section. In *Piedmont & Northern Railway Co. v. Interstate Commerce Commission, supra*, this Court, in construing other provisions of the Interstate Commerce Act, at p. 311, stated that "* * * the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of words employed by Congress."

While it may be conceded that both Detroit and Windsor are municipalities and are contiguous, such an approach to construing Section 203 (b)(8) wholly ignores the reali-

ties that prompted passage of the Act and which give true substance and sense to its words.

The grave consequences of the appealed from decision are thus made clear in light of the Congressional intent underlying Section 203 (b)(8). If Congress only intended to create the partial exemption for local cartage within a single integrated community, it is apparent that the type of intercity, line-haul operations here involved are of the kind which Congress intended to be subject to the full impact of the remedial provisions of the Interstate Commerce Act. Yet, the effect of the District Court's decision is to return such operations conducted between great numbers of "twin-cities" to an unregulated status, except for safety provisions. While the District Court may well be right, and these Appellants in error, it is most strongly urged that this issue should be resolved by the Supreme Court.

It is also important to note that Section 203 (b)(8) does not exempt all transportation conducted wholly within a municipality or between contiguous municipalities, but only that portion which is *not* "under a common control, management or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone". In imposing this restriction upon the exemption, Congress clearly demonstrated its firm intent to protect the jurisdiction of the Commission and the legislative purposes motivating the Act. Furthermore, Congress provided that the Commission shall have the power to wholly set aside the exemption whenever, in the judgment of the Commission, such action is "necessary to carry out the National Transportation Policy declared in this Act".[14] This grant of power further evi-

[14] Section 203 (b) (7) of the Act.

dences the intent of Congress that the Commission is the tribunal most suited for determining what motor carrier operations are local in nature, not requiring total regulation, and those motor carrier operations which are intercity in nature, requiring full regulation.

The Interstate Commerce Commission in *Ex Parte No. MC-37, Commercial Zones & Terminal Areas,* 46 M. C. C. 665 (1946) gave thoughtful and thorough consideration to the issue herein presented and concluded that the statutory language "between contiguous municipalities" did not encompass foreign municipalities. This proceeding had been undertaken by the Commission on its own motion, and "nearly 1200 motor, rail and water carriers, forwarders, shippers, Chambers of Commerce, trade associations, and others" were parties of record.[15] The Commission recognized that there had not been "complete consistency" in the past on this point, but nevertheless, settled the matter as indicated, and that construction has been continuously adhered to from 1946 to the present date.

The District Court overturned the Commission's ruling in its opinion dated August 2, 1957, and it is apparent the District Court was largely motivated by a recommendation of the Commission in its 1955 Report to Congress that the Act be amended so as to exempt certain border city operation. It is somewhat anomalous that a recommendation for a legislative *amendment* can be persuasive of a *construction* of the statute which obviates the need for the proposed amendment. Rather, our customary rules of statutory construction would seem to say that a consistent, long standing, administrative construction, without Con-

[15] Ex Parte No. MC-37, Commercial Zones & Terminal Areas, *supra*, at 667.

gressional action altering such construction, lends strong support for the correctness of that construction.[16] Furthermore, the District Court seems to have ruled that Congress must expressly negate an intent to include foreign land, or acts committed therein, which ruling is contrary to *Sandberg v. McDonald*, 248 U. S. 185, at 196 where Justice Day referred to "the presumption that Congress intended to deal only with acts committed within the United States * * *."

Nevertheless, Appellants recognize fully that construction of legislative language rests finally with the judiciary; but, it is respectfully urged that the instant case of statutory construction possesses highly unusual factors. As noted above, the Commission is the agency with the peculiar knowledge and experience in dealing with a transportation analysis of the Act and, thus, is most suited for interpreting the statutory language within the framework of the realities of the transportation industry. Moreover, the Commission has been empowered by Congress to set aside the partial exemption and regulate the subject transportation to the fullest extent.

In view of these unusual factors, it is submitted that the District Court should have accorded more weight to the Commission's position in this proceeding. The 1955 legislative recommendation has never been renewed and, under such circumstances, cannot be construed as reflecting the present opinion of the Commission.

In overruling the Commission's construction of Section 203 (b)(8), the District Court found no merit to the con-

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[16] New York, New Haven & Hartford Railroad Co. v. I. C. C., 200 U. S. 360, 50 L. Ed. 515 (1906); Texas & Pacific Railway Co. v. Abilene Co. Hon Oil Co., 204 U. S. 426, 51 L. Ed. 553 (1907).

tention that enforcement of the Act will be made vastly more difficult under the construction contended for by Appellees. As noted above, the exemption *only* covers traffic moving between the two border cities which is *not* under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities or zone. Thus, traffic moving through Detroit, for example, from Chicago, Illinois, to a point in Canada under a through bill of lading would continue to be subject to the Act. Similarly, a shipment originating in Detroit for delivery to a point in Canada, except Windsor, under a through bill of lading would be fully regulated traffic. Undoubtedly, the great preponderance of traffic moving via motor carriers through ports of exit or entry such as Detroit or Buffalo would still be subject to the Act, and enforcement required.[17]

As long as all traffic moving between two border cities is fully regulated, enforcement of the Act is relatively simple. All vehicles, for example, entering Detroit from Windsor would then require the customary I. C. C. markings, and, inspection to ascertain this fact poses no problem. However, the appealed from ruling destroys this easy check and makes necessary an analysis of each individual shipment on each motor truck to determine the points of origin and destination and whether the shipment is moving under "common control, management, or arrangement".

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[17] Several of the Appellant motor carriers made a survey of all traffic handled by them for October, 1955, and March, 1956, which revealed that approximately 20% of such traffic falls within the exemption under the District Court's construction of Section 203 (b) (8) and the remaining 80% would still be subject to total regulation.

The District Court was unable to find any particular enforcement problem under these circumstances, and said the Commission, if necessary, "can consult the records of the plaintiffs with respect to shippers and consignees, and the consular invoices covering these shipments".[18]

Where the motor carriers in question are domiciled in Canada, *as are plaintiffs*, it is apparent that their records are unavailable to the Commission as it has no authority to compel their production. As to consular invoices, there is at least a substantial question as to their availability, usefulness and admissibility in a criminal proceeding, particularly if records of the Canadian Customs are involved. But, setting aside these considerations, it is submitted that the District Court's suggestions demonstrate the validity of the concern of the Commission and these Appellants if the District Court's ruling is not reviewed. That concern is that enforcement of the Act on traffic still subject to regulation is going to be made so difficult as to jeopardize an adequate enforcement program.

This Court is unequestionably aware of the limited staff and budget of administrative agencies. For example, the Detroit district office of the Commission, charged with the duty of administration and enforcement of the Act for approximately one-half of the State of Michigan, until recently was staffed with the District Supervisor and a secretary. Now, three additional safety inspectors have been added as part of the Commission's increased emphasis upon safety compliance. Needless to say, any enforcement program that will necessitate continuous examination of consular records and shipping records, if available, will impose great and excessive demands upon the limited time of Commission personnel.

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[18] See, Appendix A, *infra*, pp. 23-24.

These Appellants are genuinely alarmed at this prospect, for, although as previously noted, the large bulk of their traffic will still be fully regulated, they fear that no adequate enforcement program can be maintained to protect them and the public against unlawful competition that pays no heed to established rate structures, and that, for all practical purposes, international traffic between the United States and Canada will become subject to all those abuses that led to the enactment of the Motor Carrier Act in 1935.

This prospect is substantial and real. Many of Appellants have been in business since prior to 1935. While they have witnessed the stabilization in large measure of the motor carrier industry in the intervening years, they have also noted that the Commission with its limited staff has experienced some difficulty in gaining thorough enforcement on border city operations, as plainly demonstrated by the continuous operations of the two Appellees for several years *prior* to their filing the applications for authority out of which this matter arose.

Now, if enforcement is to be made even more difficult, if not practically impossible, then, the prospect is clear. There most assuredly will develop a deterioration in the motor carrier service available to American shippers of international traffic, not only as to traffic fitting the exemption as construed by the District Court, but all traffic moving via motor carrier between the United States and Canada and Mexico.

From the standpoint of the two Appellees, the Commission found, and as affirmed by the District Court, that there is no need for their service, as existing certificated carriers are well able to handle traffic presently available. The presence of Appellees' unnecessary service only cre-

ates those very evils which Congress expressly sought to eradicate.

The Commission has filed Notices of Appeal in each of these cases. These Appellants understand that such appeals may be dismissed upon request of the Commission. If this action is taken, some question will undoubtedly be raised as to the motivation underlying it. Any analysis of that motivation, without expression by the Commission itself, is pure speculation and surmise.

In any event, these Appellants have taken this appeal because they feel most strongly that the District Court erred as a matter of law in its construction of Section 203 (b)(8). Moreover, they are firmly convinced, based upon their actual experience during the past 33 years, that removal of certificate and tariff regulation from transportation of property between border cities, such as Detroit and Windsor, Port Huron, Michigan, and Sarnia, Ontario, Buffalo, New York, and Niagara Falls, Ontario, and other similar points handling heavy volumes of international trade, will have a truly devastating effect upon the stability of all motor carrier operations between the United States and Canada.

CONCLUSION

For these reasons, it is respectfully submitted that the Supreme Court of the United States, not the Federal District Court, should provide the final construction of Section 203 (b)(8). That final construction should be after plenary consideration of this cause by this Honorable Court.

Respectfully submitted,

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Detroit 26, Michigan.

SULLIVAN, ELMER, EAMES & MOODY,
Of Counsel;

GEORGE H. CHOIACK,
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APPENDIX A

OPINION OF FEDERAL DISTRICT COURT

This is a consolidated action brought by two motor carriers against the United States of America, pursuant to 28 U. S. C. A., Secs. 1336, 2321 (1950) et seq., and 49 U. S. C. A., Sec. 17(9) (1951) to void certain orders of the Interstate Commerce Commission and to restrain the Commission from interfering with the plaintiffs' business operations. The Interstate Commerce Commission and certain interested motor carriers were permitted to intervene as defendants, pursuant to 28 U. S. C. A., Sec. 2323 (1950). Since the two cases involve substantially similar facts they were consolidated and may be disposed of together.

The plaintiffs have operated as common carriers of property by motor vehicle between Detroit, Michigan, and Windsor, Ontario, since at least 1946. They have not received authorization from the Interstate Commerce Commission to conduct their operations.

In 1953 the Commission notified the plaintiffs that their Windsor-Detroit operations could not continue without authorization from the Commission. The plaintiffs formally applied for certificates of public convenience and necessity for their cartage operations in 1954. After hearings the Commission denied the applications. It is these orders which the plaintiffs seek to annul, taking the position that no certificates are necessary, and that their applications ought not to have been made for the reason that the statute expressly exempts th m from the requirement of obtaining certificates of public convenience and necessity.

At the outset it should be made clear that there is no evidence that the Commission acted arbitrarily or capriciously. The only substantial questions before this court are whether the claimed exemptions from the jurisdiction af the Interstate Commerce Commission, under Sections 202(c)(2) and 203(b)(8) of the 1935 additions to the Interstate Commerce Act, are available to the plaintiffs. The exemptions are only partial in any event since the Commission, as is not denied by the plaintiffs, retains certain jurisdiction as to qualifications, hours of service of employees, safety and standards of equipment.

As to the exemption provided by Section 202(c)(2), 49 U. S. C. A., Sec. 302(c)(2), (1951), set out in the margin,[1] the answer is a short one. The plaintiffs do not qualify for the exemption because they are not engaged in transportation for any common carrier by railroad, express company, motor carrier, water carrier or freight forwarder subject to other chapters of the Interstate Commerce Act.

The plaintiffs claim for exemption under Sec. 203(b)(8), 49 U. S. C. A., Sec. 303 (b)(8), (1951) presents a different problem. The relevant portion of the section provides as follows:

---

[1] "* * * the provisions of this chapter * * * shall not apply (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water-carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental." 49 U. S. C. A., Sec. 302(c)(2), (1951).

"Nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in the Interstate Commerce Act, shall the provisions of this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities * * *."

The exemption at issue here is that covering the transportation of property "between contiguous municipalities." It should be noted that there is no significant legislative history of the Motor Carrier Act of 1935 concerning this exemption. See 74th Cong., Sess. I (1935), H. Rept. No. 1645; Sen. Rept. No. 482 and 79th Cong. Rec. Part 5. pp. 5650. 5631; 74th Cong. Sess. I (1935).

That Windsor and Detroit are separate municipalities is not questioned but whether they are contiguous within the meaning of the exemption must now be decided. The two municipalities are directly opposite each other, separated by a river approximately one-half mile wide, and connected by a bridge, a vehicular and passenger tunnel and and a railway tunnel. The defendants concede that the plaintiffs' cartage between Windsor and Detroit is in foreign commerce. The plaintiffs' operations therefore fit within the clear language of the second exemption, namely, that the plaintiffs are engaged in the transportation of property in foreign commerce between contiguous municipalities.

The defendants urge, however, that in spite of the clear language of this exemption it should be construed to read: "between contiguous municipalities wholly within the United States." The defendants have made no showing that Congress did not intend to give the language used its ordinary and clear meaning. Indeed, even the Commission reads this section to exempt operations which cross state boundaries. See, *Chicago, Ill. Commercial Zone*, 1 M. C. C. 673 (1937); *St. Louis, Mo.—East St. Louis, Ill. Commercial Zone*, 1 M. C. C. 656 (1937); *Kansas City Mo.—Kansas City, Kansas, Commercial Zone*, 31 M. C. C. 5 (1941).

The meaning of a statute, clear and unambiguous on its face, may not be varied by administrative decisions. *Mid-Continent Petroleum Corp. v. N. L. R. B.*, 204 F. 2d 613 (C. A. 6th, 1953), cert. den. 346 U. S. 856 (1953); *I. C. C. v. Dunn*, 166 F. 2d 116 (C. A. 5th, 1948).

It may be noted that interpretations of this section by the Commission were in conflict during the crucial years when the Motor Carrier Act was first being implemented. In *Ed Goyeau Carrier Application*, 8 M. C. C. 359 (1938); 11 M. C. C. 519 (1938) and in *Eugene Ethier Contract Carrier Application*, 14 M. C. C. 785 (1939) the Commission held that Windsor and Detroit were contiguous and that operations between these cities were therefore within the exemption of Section 203 (b)(8). In 1940, however, the Commission apparently reversed its earlier position because it granted a certificate of public convenience and necessity to a carrier for Detroit-Windsor cartage. Certificate of Direct-Winters Transport, Ltd., No. MC 37918 SUB 1, Oct. 16, 1940. Then, in 1945, in *Resler, Extension of Operations—Juarez, Mexico*, 44 M. C. C. 733, the Commission formally ruled that Section 203 (b)(8) did not apply to a foreign municipality which

was contiguous to a city in the United States (El Paso, Texas). In *Ex Parte No. M. C. 37 Commercial Zones and Terminal Areas*, 46 M. C. C. 665, 686 (1946) the Commission overruled its ruling in the *Goyeau* and *Ethier* cases, holding that the exemption provided for in Section 203 (b)(8) did not apply to Detroit-Windsor carrier operations.

Said the Supreme Court in *United States v. Mo. Pac. R. R. Co.*, 278 U. S. 269, 280 (1932), commenting on administrative constructions of statutes:

> "• • • And if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons." See, also *N. L. B. B. v. Globe Automatic Sprinkler Co.*, 199 F. 2d 64 (C. A. 3d, 1952).

It seems clear, therefore, that this court ought not to attach such weight to the present interpretation by the Commission as to override its own judgment of the force of the statute.

We are also convinced that a literal interpretation of the section best complies with the intent and the policy of the statute. The exemption in question is clearly directed to relieving the Commission of the burdensome and highly expensive task of regulating purely local cartage operations. It is common knowledge that the United States borders at Mexico and Canada are dotted with "twin-cities," one of which is on each side of the border. No reason appears why the regulation of purely local cartage between such cities would be any less burdensome to the Commission, or more important to the economy of this country, than the regulation of cartage between Kansas City, Kansas and Kansas City, Missouri, or between New York City and Newark, New Jersey.

Indeed, in 1955 the Commission itself recognized that such border city operations were not important enough to be regulated by the Commission. In its Report to Congress for that year the Commission, acting under the assumption that Section 203(b)(8) did not exempt border city cartage operations, made this recommendation:

> "The present exemptions for local drayage do not apply to transportation from a city on the border of the United States to points in Canada or Mexico. Inasmuch as the Commission has found that no part of a foreign country is a part of a commercial zone which is exempt under section 203 (b)(8) of the act, it is necessary for all motor carriers performing local drayage between Detroit, Mich., and Windsor, Canada, or between El Paso, Tex., and Juarez, Mexico, and between other border points to obtain operating authority from the Commission. As a matter of practice, however, most of such local drayages have not obtained certificates, and the operations, particularly along the Mexican border, are being conducted in violation of the law. *This transportation does not seem to be of sufficient importance to the economy of the United States to justify the present requirement.*" (Emphasis added.) The 69th Annual Report to Congress by the Interstate Commerce Commission, p. 128 (1955).

Although this recommendation was not renewed in the 1957 report, the Commission does not claim that the economic importance of these operations has changed since 1955.

Nor are we persuaded that the exemption of border city cartage would create special problems of enforcement for the Commission. The defendant asserts that the Commission would be unable to discover whether the plaintiffs would operate in Canada beyond Windsor and therefore be outside the exemption for contiguous municipalities.

Assuming that the plaintiffs do extend their operations into Canada beyond Windsor, we fail to see how this should affect their exemption for operations between Detroit and Windsor. That the Commission is not concerned with purely Canadian operations is clearly demonstrated by the wording of the certificates given in the past to other Detroit-Windsor carriers. See, for example, the certificate of Charles Hinton and Company, Ltd., No. MC 864 23 (1949) "Between Detroit, Mich. and points and places within 8 miles of Detroit, on the one hand, and, on the other, the boundary of the United States and Canada at Detroit," and the Certificate of Detroit-Winters Transport, Ltd., No. MC 37918 SUB 1 (1940).

It also seems clear that as late as 1955 the Commission saw no great problems of enforcement or it would not have urged in its report that its jurisdiction over these operations be terminated. Here, also, the Commission does not claim that any new problems of enforcement have arisen since 1955.

Moreover, as a practical matter, if deemed necessary or important, the Commission can easily discover whether the plaintiffs have extended their operations. It can consult the records of the plaintiffs with respect to the shippers and consignees, and the consular invoices covering these shipments.

There is no merit in the claim of the Commission that the instant proceeding is a collateral attack on *Ex Parte No. MC-37 Commercial Zones and Terminal Areas*, 46 M. C. C. 665 (1946). This is an attack on the hearings to which these plaintiffs were parties. *Donald Gouin, Common Carrier Application, No. MC-114807; Peter Verbeem, Common Carrier Application, No. MC 114663.* The plaintiffs allege here that the Commission lacked jurisdic-

tion over the subject matter involved in these hearings. A judgment rendered without jurisdiction over the subject matter in question is void and a void judgment may be attacked directly or collaterally at any time. See, e.g., *Williams v. North Carolina,* 325 U. S. 226 (1945); *Rose v. Himely,* 4 Cranch. (U. S.) 241 (1808); 7 Moore's Federal Practice Par. 60.41 (1) (2d ed., 1954).

The statute exempts the plaintiffs in the operations here described from the requirement that they obtain certificates of public convenience and necessity. An appropriate form of order may be presented for signature.

THEODORE LEVIN,
United States District Judge.

I concur,
CHARLES C. SIMONS,
Chief Judge, United States Court of Appeals,

I concur;
RALPH M. FREEMAN,
United States District Judge.

Dated: Detroit, Michigan,
August 2, 1957.

APPENDIX B-1

ORDER OF PERMANENT INJUNCTION IN VERBEEM CASE

The above captioned matter having regularly come on to be heard pursuant to 28 U. S. C. A., Section 1336, 2321 et seq., and 49 U. S. C. A., Sec. 17 (9) and a three-judge District Court having been instituted pursuant thereto, and a hearing having been held at which time the parties hereto offered certain evidentiary material and presented legal argument, and briefs in the matter having been filed by all parties hereto, and this Court, being fully apprised in the premises, having rendered an opinion of August 2, 1957, determining that the Interstate Commerce Commission is without jurisdiction to require plaintiff to seek and obtain certificates of public convenience and necessity, therefore,

IT IS ORDERED, ADJUDGED AND DECREED, That the Interstate Commerce Commission, its officers, agents and employees, are hereby permanently restrained and enjoined from enforcing against plaintiff its order of October 18, 1955, and from requiring plaintiff to seek a Certificate of Public Convenience and Necessity in order to operate as a common motor carrier for hire in the transportation of property on shipments moving between Windsor, Ontario, Canada, on the one hand, and on the other, Detroit, Michigan and points in the Detroit, Michigan commercial zone, as defined by the Interstate Commerce Commission; PROVIDED, HOWEVER, that the origin and destination of such shipments shall be confined to Windsor, Ontario, Canada and Detroit, Michigan and points in the Detroit commercial zone, as defined by the Interstate Commerce Commission.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That this Order shall in no way restrict the Interstate Commerce Commission from enforcing as to plaintiff the provisions of Section 204 of Part II of the Interstate Commerce Act (being 49 U. S. C. A., Sec. 304) relative to qualifications and maximum hours of service of employees and safety of operations and standards of equipment.

So ordered this 16th day of September, A. D., 1957.

CHARLES C. SIMONS,
Chief Judge, United States Court of Appeals,

THEODORE LEVIN,
United States District Judge,

RALPH M. FREEMAN,
United States District Judge.

A true Copy:
By: C. James Chaffee,
Deputy Clerk.

APPENDIX B-2

ORDER OF PERMANENT INJUNCTION IN GOUIN CASE

The above captioned matter having regularly come on to be heard pursuant to 28 U. S. C.. A., Section 1336, 2321 et seq., and 49 U. S. C. A., Sec. 17 (9) and a three-judge District Court having been instituted pursuant thereto, and a hearing having been held at which time the parties hereto offered certain evidentiary material and presented legal argument, and briefs in the matter having been filed by all parties hereto, and this Court, being fully apprised in the premises, having rendered an opinion of August 2, 1957, determining that the Interstate Commerce Commission is without jurisdiction to require plaintiff to seek and obtain certificates of public convenience and necessity, therefore,

IT IS ORDERED, ADJUDGED AND DECREED, That the Interstate Commerce Commission, its officers, agents and employees, are hereby permanently restrained and enjoined from enforcing against plaintiff its order of December 23, 1955, and from requiring plaintiff to seek a Certificate of Public Convenience and Necessity in order to operate as a common motor carrier for hire in the transportation of property on shipments moving between Windsor, Ontario, Canada, one the one hand, and on the other, Detroit, Michigan and points in the Detroit, Michigan commercial zone, as defined by the Interstate Commerce Commission; PROVIDED, HOWEVER, that the origin and destination of such shipments shall be confined to Windsor, Ontario, Canada and Detroit, Michigan and points in the Detroit commercial zone, as defined by the Interstate Commerce Commission.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That this Order shall in no way restrict the Interstate Commerce Commission from enforcing as to plaintiff the provisions of Section 204 of Part II of the Interstate Commerce Act (being 49 U. S. C. A., Sec. 304) relative to qualifications and maximum hours of service of employees and safety of operations and standards of equipment.

So ordered this 16th day of September, A. D., 1957.

CHARLES C. SIMONS,
Chief Judge, United States Court of Appeals,

THEODORE LEVIN,
United States District Judge,

RALPH M. FREEMAN.
United States District Judge.

A true Copy:
By: C. James Chaffee,
Deputy Clerk.

APPENDIX C-1

REPORT OF THE COMMISSION, DIVISION 1, IN VERBEEM CASE

Division 1, Commissioners Mitchell, Tuggle and Hutchinson by Division 1:

Exceptions were filed by applicant to the order recommended by the joint board, and protestants and interveners replied.

By application filed April 1, 1954, Peter Verbeem, of Windsor, Ontario, Canada, doing business as Peters Cartage Service, seeks a certificate of public convenience and necessity authorizing operation, in foreign commerce, as a common carrier by motor vehicle of general commodities, with certain exceptions, between points in the Detroit, Mich., commercial zone, on the one hand, and, on the other, the United States-Canadian International boundary line at ports of entry at or near Detroit, over irregular routes. Numerous motor carriers oppose the application.

The board recommended denial of the application. In his exceptions, applicant contends, that his past operations conducted under a color of right together with the testimony of the supporting shippers establishes a need for the proposed service, and that a grant of the requested authority will not adversely affect presently authorized carriers. These contentions are in turn denied by replicants which urge that the application be denied.

We have given full consideration to the evidence, and to the exceptions and replies thereto, and find that the board's report reflects the facts of record. Like the

board, we conclude that the testimony of the five supporting shippers and the past operations of applicant fall far short of establishing a need for the proposed service. One shipper has used applicant's service since 1946 and three others since 1952. The fifth utilized applicant's service from 1946 to 1950. Collectively, their present utilization of applicant's service is for the transportation of from 85 to 150 shipments a year. They have made little, if any, use of the services of the, at least, 15 existing motor carriers now authorized to operate within the area proposed to be served by applicant. There is no basis in this record for concluding that existing authorized services are inadequate. The past operations of applicant for the supporting shippers and others upon which applicant strongly relies, are insufficient, of themselves, to warwant a grant of the sought authority.

We find that applicant has failed to establish that the present and future public convenience and necessity require the proposed operation; and that the application should be denied.

An appropriate order will be entered.

ORDER

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 1, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 18th DAY OF OCTOBER, A. D. 1955.

No. MC-114663

Peter Verbeem Common Carrier Application

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application be, and it is hereby, denied.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(Seal)

APPENDIX C-2

ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 26th DAY OF MARCH, A. D. 1956.

No. MC-114663

Peter Verbeem Common Carrier Application

(Windsor, Ontario, Canada)

Upon consideration of the record in the above-entitled proceeding, and of:

1. Petition dated November 29, 1955 by applicant for reconsideration;
2. Joint reply of Consolidated Truck Lines, Ltd., Direct-Winters Transport, Ltd., and Inter-City Truck Lines, Ltd., protestants, dated December 16, 1955;
3. Joint reply by Creasey Cartage, Ltd., et al., interveners, dated December 20, 1955;

and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby, denied, for the reason that the evidence adequately supports the findings of Division 1 herein.

By the Commission.

HAROLD D. McCOY,
Secretary.

(Seal)

APPENDIX C-3

ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 28th DAY OF AUGUST, A. D. 1956.

No. MC-114663

Peter Verbeem Common Carrier Application

(Windsor, Ontario, Canada)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant for reopening, reconsideration, and further hearing, dated May 16, 1956;

(2) Joint reply of Consolidated Truck Lines, Ltd., DirectWinters Transport, Ltd., and Inter-City Truck Lines, Ltd., protestants, dated June 1, 1956;

(3) Joint petition of Amlin Cartage and 11 other interveners, dated June 4, 1956;

and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby, denied, for the reasons that (1) the findings of Division 1 are adequately supported by the evidence, (2) applicant has been afforded ample opportunity to be heard and further hearing is not shown to be warranted, and (3) no sufficient cause appears for granting reopening, reconsideration, or the setting aside of the Commission's order of March 26, 1956.

By the Commission.

HAROLD D. McCOY,
Secretary.

(Seal)

APPENDIX D-1

REPORT OF THE COMMISSION, DIVISION 1, IN GOUIN CASE

DIVISION 1, COMMISSIONERS MITCHELL, TUGGLE, AND HUTCHINSON BY DIVISION 1:

Exceptions to the order recommended by the joint board were filed by applicant and certain protestants and interveners in opposition to the application. Protestants and interveners in opposition replied to applicant's exceptions. Our conclusions differ from those recommended.

By application filed June 21, 1954, Donald Gouin, doing business as Don's Transports & Cartage, of Tecumseh, Ontario, Canada, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, between Detroit, Mich., and points in the Detroit, Mich., commercial zone, on the one hand, and, on the other, the United States-Canadian international boundary at or near Detroit, over irregular routes. Numerous motor carriers oppose the granting of the application.

The board recommended that applicant be granted authority to operate as a common carrier by motor vehicle, of roofing and roofing materials, from Detroit, Mich., to the United States-Canadian international boundary at or near Detroit, over irregular routes. On exceptions, ap-

plicant contends that evidence of past operations conducted by him under "color of right" together with shipper's testimony, establishes that there is need for the continuance of his service in the transportation of general commodities between the described points. In their exceptions and replies to those of applicant, protestants and interveners contend that any past operations by applicant under a claimed color of right merit no consideration in view of applicant's failure to file promptly an application for appropriate authority when notified that such was necessary; and that the evidence submitted in this proceeding completely fails to show a need for the proposed service which cannot be met by existing carriers.

Consideration has been given to the evidence, and to the exceptions and replies thereto, and we find the board's statement of facts to be correct and adequate with the following additions, and as thereby supplemented, such statement is adopted as our own. We are unable, however, to agree with the conclusions reached by the board.

Applicant, since early in 1946, has been transporting various commodities, principally whiskey, building and roofing materials, and automobile parts, between Detroit and the international boundary between that point and Windsor, Ontario Canada. These operations were unauthorized, and in April 1952, applicant was informed by letter from a representative of this Commission that appropriate authority was required. Approximately 15 months thereafter applicant engaged an attorney but failed to provide him with necessary data for the filing of an application; thereafter he engaged another attorney and filed the instant application on June 21, 1954. Applicant's record of past shipments shows that for the past several years his operation has consisted predominately of the transportation of roofing materials and automobile

parts from Detroit to Windsor. One tractor-trailer unit has been used in the operation.

The supporting shipper of roofing materials has used applicant's service from Detroit to Windsor in the transportation of 10 to 15 shipments of roofing materials in 1952; 15 to 20 shipments in 1953; and 20 to 25 shipments in 1954. It requires prompt service and is satisfied with that rendered by applicant; however, it has made no investigation as to the number of presently authorized carriers and has not tendered them any of the traffic. It was stipulated between the parties that another shipper of roofing materials does business with applicant in a similar manner. Fifteen motor carriers having authority to operate between the points involved offered evidence, directly or by stipulation, as to their willingness and ability to meet the transportation requirements of the described shippers.

The burden of proof is upon applicant to establish that the proposed service is required by the public convenience and necessity, and his past operations for the supporting shippers and others, standing alone, are insufficient to warrant a grant of authority. Clearly, there is an abundance of motor service available in the area, and there is no showing on this record that such service is inadequate in any respect. Under the circumstances, we conclude that the application should be denied.

We find that applicant has failed to establish that the present and future public convenience and necessity require the proposed operation; and that the application should be denied.

An appropriate order will be entered.

ORDER

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 1, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 23rd DAY OF DECEMBER, A. D. 1955.

No. MC-114807

Donald Gouin Common Carrier Application

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its finding of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application be, and it is hereby denied.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(Seal)

APPENDIX D-2

ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 3rd DAY OF MAY, A. D. 1956.

No. MC-114807

Donald Gouin Common Carrier Application

(Tecumseh, Ontario, Canada)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant for reconsideration and further hearing, dated March 1, 1956;

(2) Joint reply of Consolidated Truck Lines Limited, Direct-Winters Transport, Ltd., and Inter-City Truck-Lines Limited, protestants, dated March 19, 1956;

(3) Joint reply of E. W. Lancaster Co., Ltd., Creasey Cartage Ltd., International Cartage, Ltd., Maroon Cartage, Morrice Cartage, Overland Express, Ltd., Amlin Cartage, Bondy Cartage, Parent Cartage and McCourt Cartage, protestants, and Windsor Truck & Storage and C. Hinton Company, Ltd., interveners in opposition, dated March 19, 1956;

and good cause appearing therefore;

It is ordered, That said petition be, and it is hereby, denied, for the reasons that (1) the evidence adequately supports the findings of Division 1, and (2) further hearing is not warranted.

By the Commission.

HAROLD D. McCOY,
Secretary.

(Seal)

APPENDIX D-3

ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 24th DAY OF AUGUST, A. D. 1956.

No. MC-114807

Donald Gouin Common Carrier Application

(Tecumseh, Ontario, Canada)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Applicant's petition for "stay of effective date, reopening and reconsideration of order of the Interstate Commerce Commission dated May 3, 1956, and/or for dismissal of application", dated June 15, 1956.

(2) Joint reply of Consolidated Truck Lines Limited, Direct-Winters Transport, Ltd., and Inter-City Truck Lines Limited, protestants, dated July 3, 1956.

(3) Joint reply of E. W. Lancaster Co., Ltd., Creasey Cartage Ltd., International Cartage, Ltd., Maroon Cartage, Morrice Cartage, Overland Express, Ltd., Amlin Cartage, Bondy Cartage, Parent Cartage and McCourt Cartage, protestants, and Windsor Truck & Storage and C. Hinton Company, Ltd., interveners in opposition, dated July 6, 1956.

and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby denied, for the reasons that (1) the findings of Division 1 are adequately supported by the evidence, and (2) that no sufficient cause appears for granting reopening, reconsideration or the setting aside of the order of May 3, 1956.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(Seal)

APPENDIX E

Portion of Commission's Decision in Ex Parte No. MC-37

"Despite the implication in the cases above discussed that operations between Detroit and Windsor might be found to be within the exemption provided by section 203 (b)(8), and the consequent withholding of the requested operating authorities because it had not been shown that such operations were not within the exemption, we are now convinced that the conditional and partial exemption, provided by section 203 (b)(8) applies only to local operations performed wholly within the United States. The reference in the statute to "transportation * * * wholly within a municipality" unquestionably refers only to municipalities in the United States. By the same token we think the reference to "contiguous municipalities" and to the "zone adjacent to and commercially a part of such municipality or municipalities" should be read as referring only to contiguous municipalities and commercial zones within the United States. This was the result reached in Resler Extension of operations—Juarez, Mex. 44 M. C. C. 733, decided subsequent to the cases cited above. From the foregoing it follows that the commercial zone, contemplated by section 203 (b)(8), adjacent to any municipality located at or near an international boundary, consists of the same areas as would be included were the municipality in question otherwise located, except that all municipalities, contiguous or otherwise, and all unincorporated areas, not within the United States, must be excluded."